

## Proposed Amendments to Rule 5

Rule 5 is amended as follows:

### Rule 5. Service and Filing of Pleadings and Other Papers

(a) Service: When Required. \* \* \*

~~[(b) Same: How Made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.]~~

### **(b) Making Service.**

**(1) Service under these rules on a party represented by an attorney is made on the attorney unless the court orders service on the party.**

**(2) Service under Rule 5(a) is made by:**

**(A) Delivering a copy to the person served by:**

**(i) handing it to the person;**

**(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or**

**(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.**

**(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing.**

**(C) Delivering a copy by overnight delivery service to the last known address of the person served. Such service is complete upon deposit of the paper enclosed in a properly addressed wrapper into the custody of the overnight**

delivery service for overnight delivery, prior to the latest time designated by the overnight delivery service for overnight delivery. "Overnight delivery service" means any delivery service which regularly accepts items for overnight delivery. "Overnight delivery service" does not include any service provided by the U. S. Postal Service (including express, priority or other expedited service), which is to be considered "mail" under subparagraph (B).

(D) If the person served has no known address, leaving a copy with the clerk of the court.

(E) Delivering a copy by any other means, including electronic means, consented to in writing by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. As authorized by rule or order of the court, a party may make service under this subparagraph (E) through the court's transmission facilities.

(3) Service by electronic means under Rule 5(b)(2)(E) is not effective if the party making service learns that the attempted service did not reach the person to be served.

(c) Same: Numerous Defendants. \* \* \*

(d) Filing: When Required. \* \* \*

(e) Filing with the Court Defined. \* \* \*

(f) Filing of Summons and Complaint by Mail. \* \* \*

(g) Proof of Service. \* \* \*

(h) Filings Containing Business Proprietary Information in an Action Described in 28 U.S.C. §1581(c). \* \* \*

(i) Electronic Filing. \* \* \*

PRACTICE COMMENT: \* \* \*

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(As amended, eff. Jan. 1, 1982; Oct. 3, 1984, eff. Jan. 1, 1985; July 28, 1988, eff. Nov. 1, 1988; Oct. 3, 1980, eff. Jan. 1, 1991; Nov. 29, 1995, eff. Mar. 31, 1996; Nov. 14, 1997, eff. Jan. 1, 1998; May 27, 1998, eff. Sept. 1, 1998; Dec. 18, 2001, eff. Apr. 1, 2002; Sept. 30, 2003, eff. Jan. 1, 2004; \_\_\_\_\_, **2005, eff. \_\_\_\_\_, 2006.**)

### **ADVISORY COMMITTEE NOTE**

Current Rule 5(b) does not specifically provide for service by overnight delivery service, but such service is relatively common. Nor does Rule 5(b) provide for service by electronic means, but it is authorized in appropriate circumstances under CIT Administrative Order (“AO”) 02-01 (April 1, 2002) (“In re Electronic Filing Procedures”). The Advisory Committee recommends that Rule 5(b) be amended to specifically cover overnight delivery service and electronic service. The proposed amendment is patterned after Federal Rule of Civil Procedure 5(b), with certain differences discussed below.

Both USCIT R. 5(b) and FRCvP 5(b) provide for service by various forms of personal delivery, mail and delivery to the clerk of the court. Compare CIT R. 5(b) with FRCvP 5(b)(2) A-C. In addition, subparagraph (D) of FRCvP 5(b)(2) provides for service by:

Delivering a copy by any other means, including electronic means, consented to in writing by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. If authorized by local rule, a party may make service under this subparagraph (D) through the court’s transmission facilities.

Service by commercial express service, such as FedEx or DHL, is within the scope of delivery by “other means .... consented to in writing by the person serviced.”<sup>1</sup> In view of the common practice of CIT litigants to serve papers by overnight delivery service without the explicit consent of the party served, the Advisory Committee recommends that Rule 5(b) be amended to explicitly provide for service by overnight delivery service, but without requiring the consent to such service by the party to be served. The current practice appears not to have caused problems, and a consent requirement at this point could result in instances of faulty or defective service by litigants accustomed to employing such service without consent. Proposed CIT R. 5(b)(2)(C), therefore, would allow service by overnight delivery service without requiring the explicit consent of the party served.

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<sup>1</sup> See FRCvP 5, Advisory Committee Notes (2001 Amendments), Changes Made After Publication of Comments (“... other means consented to such as commercial express service ...”)

With respect to when such service is “complete”, FRCvP 5(b)(2)(D) provides that it is complete “when the person making service delivers the copy to the agency designated to make delivery.” In view of the fact that the Committee is recommending that consent not be required, the Committee recommends more precise language with respect to when service is complete, and suggests adopting the language in local rule 5.3 of the District Courts for Southern and Eastern District of New York, which provides that service is complete “upon deposit of the paper enclosed in a properly addressed wrapper into the custody of the overnight delivery service for overnight delivery, prior to the latest time designated by the overnight delivery service for overnight delivery.” Thus, whether a party deposits the paper in the delivery agent’s receptacle in an office lobby, takes it to the overnight delivery agent’s office or has it picked up, the burden is on the serving party to meet the time deadline of the delivery agent in order to claim service was made on that date.

The Committee intends that “overnight delivery service” not include “express mail,” “priority mail,” or any other type of expedited delivery offered by the U. S. Postal Service and, therefore, subparagraph (C) defines “overnight delivery service” to exclude deliveries by the U. S. Postal Service, such as “express mail,” etc., which shall be considered “mail” covered by subparagraph (B). Nevertheless, the 5 additional days afforded by CIT Rule 6(c) to respond to service by mail will also apply to service by overnight delivery service. See proposed amendment to Rule 6.

Subparagraph (E) provides for service by electronic means when consented to in writing by the person served. Such service is complete on transmission. The rule specifically provides that a party may make service under subparagraph (E) through the court’s transmission facilities. As noted above, such service is currently authorized, in appropriate circumstances, by AO 02-01. See AO 02-01, paragraph 6.

Subparagraph (E) also provides for service “by any other means . . . consented to in writing by the person served.” As noted above, FRCvP 5(b)(2)(D) contains similar language, but implicitly includes, within “other means”, overnight delivery service. Since CIT R. 5(b)(2)(C) explicitly provides for overnight delivery service, it is expected that service by “any other means” under subparagraph (E) would be rare. When such instances occur, however, written consent of the party served would be required.

Under proposed Rule 5(b)(3), which follows FRCvP 5(b)(3), service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served. The rule is intended to apply where the electronic transmission fails in some respect and the person attempting to make service learns of the failure. In this regard, the Advisory Committee Note to FRCvP 5(b) (2001 Amendments) is instructive:

Paragraph (3) addresses a question that may arise from a literal reading of the provision that service by electronic means is complete on transmission. Electronic communication is rapidly improving, but lawyers report continuing failures of transmission, particularly with respect to attachments. Ordinarily the risk of nonreceipt falls on the person being served, who has consented to this form of service. But the risk should not extend to situations in

which the person attempting service learns that the attempted service in fact did not reach the person to be served. Given actual knowledge that the attempt failed, service is not effected. The person attempting service must either try again or show circumstances that justify dispensing with service.

Paragraph (3) does not address the similar questions that may arise when a person attempting service learns that service by means other than electronic means in fact did not reach the person to be served. Case law provides few illustrations of circumstances in which a person attempting service actually knows that the attempt failed but seeks to act as if service had been made. This negative history suggests there is no need to address these problems in Rule 5(b)(3). This silence does not imply any view on these issues, nor on the circumstances that justify various forms of judicial action even through service has not been made.

See FRCvP 5 Advisory Committee Notes (2001 Amendments).